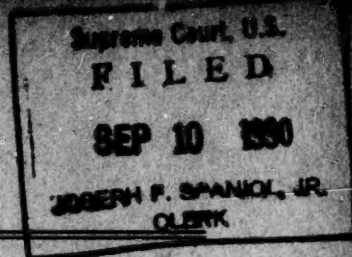


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No. 90-190



**In The
Supreme Court of the United States
October Term, 1989**

MICHAEL J. DODSON,

Petitioner,

v.

**SUPERIOR COURT OF THE
STATE OF CONNECTICUT,**

Respondent.

**BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT**

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QUESTIONS PRESENTED

I. Whether The Decision Of The Connecticut Supreme Court, Affirming the Trial Judge's Finding Of Summary Criminal Contempt Against The Petitioner, Violates The Petitioner's First Amendment Right To Expression And Sixth Amendment Right To Counsel?

II. Whether The Connecticut Supreme Court Erred In Holding That The Procedure By Which The Trial Judge Adjudicated And Punished The Petitioner Of Summary Criminal Contempt Comported With The Due Process Requirements Of The Fourteenth Amendment?



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**CONSTITUTIONAL PROVISIONS
AND RULES INVOLVED**

**First Amendment to the United States
Constitution**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Sixth Amendment to the United States
Constitution**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and

usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 214 Conn. 344, ___ A.2d ___ (1990), and is reproduced in the petitioner's appendix at 2a. The petitioner's motion for reargument and reconsideration was denied by the Supreme Court on April 25, 1990. A copy of the order denying the motion is reproduced in the petitioner's appendix at 78a.

I. STATEMENT OF THE CASE

On November 10, 1988, during a sentencing hearing in a criminal matter before the Connecticut Superior Court, the petitioner, a member of the Connecticut Bar, was held in contempt for remarks directed to the court. Immediately following the petitioner's outburst, court was recessed and the petitioner was given the opportunity to obtain counsel. Counsel appeared and asked that the matter be continued until the next available court date, November 15, 1988.

On November 15, 1988 the trial court, after hearing the arguments of counsel for the petitioner and the petitioner himself, imposed a fine of one hundred dollars. On November 28, 1988 the petitioner filed with the trial court a motion for articulation of the legal basis for its actions of

November 10, 1988. In its written articulation (see Petitioner's Appendix at 79a), the trial court stated that the defendant was held in summary contempt pursuant to Connecticut Practice Book §988.¹

On December 22, 1988 the petitioner filed a writ of error challenging the adjudication of contempt. The Connecticut Supreme Court, sitting en banc, heard oral

¹ Connecticut Practice Book § 988 provides:

"A criminal contempt may be punished summarily if the conduct constituting the contempt was committed in the actual presence of the court or the judicial authority and such punishment is necessary to maintain order in the courtroom. A judgement of guilty of contempt shall include a recital of those facts on which the adjudication of guilt is based. Prior to the adjudication of guilt the judicial authority shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by presenting evidence of excusing or mitigating circumstances."

argument on December 5, 1989. That Court affirmed the judgment of contempt on March 27, 1990, with one justice dissenting.

The Connecticut Supreme Court concluded that the conduct of the petitioner constituted contempt under Connecticut Practice Book §985.² In re Dodson, 214 Conn. at 349-360; Petitioner's Appendix at 11a - 36a. It further held that the proceedings culminating in the trial judge's finding of summary criminal contempt satisfied the due process rights encompassed in Connecticut Practice Book §988 and the Fourteenth Amendment to the United States Constitution. In re Dodson, 214 Conn. at

² Connecticut Practice Book § 985 provides:

"A criminal contempt is conduct that is directed against the dignity and authority of the court. The sanction for a criminal contempt is punitive in order to vindicate the authority of the court."

II. REASONS FOR DENIAL OF THE PETITION

A. The Connecticut Supreme Court's Finding Of Contempt Is Consistent With Federal Precedent And Does Not Present Any Federal Question Worthy of Certiorari Review

The petitioner claims that the decision below conflicts with the decisions of this Court by providing unfettered judicial discretion in summary contempt matters, thereby infringing on the constitutional rights associated with zealous advocacy. In support of this contention the petitioner offers two overlapping arguments. First, he argues that the Connecticut Supreme Court has defined "contempt" in an overly broad manner and, as a result, has imposed a chilling effect on the vigorous attorney advocacy protected by the first and sixth amendments. Second, he argues that his

conduct failed, as a matter of law, to constitute contempt. The petitioner's tenuous claim does not warrant review by this Court for several reasons.

1. The Judgment Of Contempt Presents A Unique, Fact-Bound Determination Of State Law.

The Connecticut Supreme Court held that the conduct of the petitioner before the trial court at a sentencing hearing constituted contempt within the meaning of Connecticut Practice Book §985, as it was "directed against the dignity and authority of the court." The holding below turns on that court's application of the facts of this case to the terms of the Connecticut Practice Book within well-established constitutional boundaries. This Court does "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 286 U.S. 220, 45 S.Ct. 496, 497

(1925). The state supreme court is the final interpreter of the meaning of its rules and its determination on the question of contempt does not present a federal question worthy of certiorari review. Because the Connecticut Supreme Court has not decided a federal question, the petitioner's alleged basis for certification is insubstantial on its face.

2. The Petitioner Fails To Demonstrate Any Conflict Between The Decision Of The Connecticut Supreme Court And The Controlling Precedents Of This Court

"[T]he power to punish for contempt is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795, 107 S.Ct. 2124 (1987). A criminal contempt order serves the purposes of punishing

willful disregard of the authority of the court and deterring the occurrence of similar derelictions. United States v. United Mine Workers, 330 U.S. 258, 302-303, 67 S.Ct. 677 (1947). "The underlying concern that gave rise to the contempt power was not, however, merely the disruption of court proceedings. Rather, it was disobedience to the orders of the judiciary, regardless of whether such disobedience interfered with the conduct of trial." Young v. United States ex rel. Vuitton el Fils S.A., 481 U.S. at 798.

Balanced against the judicial power of contempt is the right of an attorney to zealously represent his client. "Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts." Sacher v. United States,

343 U.S. 1, 9, 72 S.Ct. 451 (1952). "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." In re McConnell, 370 U.S. 230, 236, 82 S.Ct. 1288 (1962).

The petitioner here, faced with the pronouncement of a sentence with which he disagreed, chose to challenge the dignity and authority of the court with angry and disrespectful remarks. See In re Dodson, 214 Conn. at 347-48; Petitioner's Appendix at 5a - 8a. The petitioner twice interrupted the court as it attempted to instruct the clerk to give notice of a right to appeal. Persisting after the second interruption, the petitioner again lambasted

the sentence of the court. Warned that he was out of order, the petitioner paused briefly to acknowledge that fact, only to renew his tirade. As the trial court noted, the petitioner raised his voice and threw his pencil during the outburst. In re Dodson, 214 Conn. at 355-57; Petitioner's Appendix at 24a - 27a.

The Connecticut Supreme Court correctly held that this behavior "went beyond the permissible parameters of advocacy" and rose to the level of contempt of court. In re Dodson, 214 Conn. at 355-57; Petitioner's Appendix at 24a - 30a. As that court found, the petitioner's misconduct "led to obstruction and delay and was directed against the dignity of the court." Id., 360. This holding rested on a proper balancing of the competing interests inherent in the power of contempt and the right of zealous

advocacy. The court below undertook an exhaustive and accurate analysis of the relevant federal precedent. Id., 349-61. This analysis led to the valid conclusion that the boundaries of zealous advocacy established by this Court in such cases as In re McConnell, supra, and In re Little, 404 U.S. 553, 92 S.Ct. 659 (1972), had been exceeded.

Rather than utilizing effective and zealous advocacy in behalf of his client, the petitioner chose to insult the trial judge and challenge the dignity of the proceedings of which that judge is a minister. It is to demean not only the judicial system, but also the profession of lawyering, to include such conduct within the ambit of "advocacy." Far from demonstrating a constitutional "conflict" ready for correction by this Court, the

petitioner establishes only his flawed understanding of the meaning of true advocacy.

3. The Petitioner's First and Sixth Amendment Claims Were Not Raised Below And, Therefore, Should Not Be Reviewed By This Court

The petitioner's writ of error in the Connecticut Supreme Court was premised on the due process clause of the fourteenth amendment. In his petition for certiorari the petitioner substantially expands his complaint to encompass the first amendment right of expression and the sixth amendment right to effective assistance of counsel. This alteration of the constitutional predicate for his claim provides yet another reason for denial of his petition.

This Court has held that it would not "decide federal constitutional issues raised here for the first time on review of state

court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1162 (1969). The petitioner failed to raise his first and sixth amendment claims in the Connecticut Supreme Court. Accordingly, this Court should decline to review his claim since it was not "pressed or passed upon below." Illinois v. Gates, 462 U.S. 213, 219, 103 S.Ct. 2317 (1983); see, Michigan v. Long, 463 US. 1032, 1053, 103 S.Ct. 3469 (1983); Fay v. Noia, 373 U.S. 391, 399, 83 S.Ct. 822 (1963).

B. The Holding Of The Connecticut Supreme Court Is Consistent With The Principles Of Due Process Established By This Court

In the second part of his petition, the petitioner argues that summary contempt was not appropriate under the facts of this case and that the adjudication of contempt did not satisfy procedural due process. This

alleged basis for certification is merely a rehashing of arguments properly rejected by the Connecticut Supreme Court. The petitioner has not presented any federal question or source of conflict that merits this Court's attention.

This Court has recognized that "the requirements of due process cannot be ascertained through mechanistic application of a formula." Groppi v. Leslie, 404 U.S. 496, 500, 92 S.Ct. 582 (1972). "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.... The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502 (1960). The touchstones of due process are fundamental fairness and

the protection of the individual against arbitrary government action. Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976).

The petitioner in the present case was cautioned in open court that he was "out of order." The petitioner acknowledged the fact and continued in his contumacious behavior. Following the pronouncement that the petitioner be held in contempt, the trial court directed that he remain in the courtroom and afforded him the opportunity to obtain counsel, who arrived in court shortly thereafter. The trial court "was prepared to continue and finish the summary contempt proceedings at [this] time." Petitioner's Appendix at 81a. At the request of the petitioner, the proceedings were continued until the next court day. When the proceedings were resumed both the petitioner and his counsel were given the

opportunity to speak. After this hearing, the trial court imposed a one hundred dollar fine.

The Connecticut Supreme Court, closely analyzing the relevant federal cases, concluded that this adjudication of summary contempt comported with the requirements of due process as provided by the United States Constitution and prescribed by Connecticut Practice Book §988. Nothing in this conclusion is at odds with federal precedent. The petitioner had reasonable notice of the nature of the accusation against him and clearly understood the trial judge's perception of his conduct. In re Dodson, 214 Conn. at 364; see Groppi v. Leslie, 404 U.S. 496, 502, 92 S.Ct. 582 (1972); Pennsylvania v. Local Union 542, International Union of Operating Engineers, 552 F.2d 498, 512 n.20A (3d Cir.), cert

denied, 434 U.S. 822 (1977). The petitioner was given a hearing and afforded the opportunity to explain his actions. See Taylor v. Hayes, 418 U.S. 491, 498, 94 S.Ct. 2697 (1974). The trial judge was not embroiled in any type of running controversy with the petitioner and was fully capable of maintaining "that calm detachment necessary for fair adjudication" required by due process. Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S. Ct. 499 (1971); see Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841 (1964).

The holding of the Connecticut Supreme Court exemplifies a proper adherence to well-settled law. The petitioner has wholly failed to demonstrate a ground for certiorari in this area of fourteenth amendment due process jurisprudence.

CONCLUSION

The petitioner presents no issue of importance worthy of review. Therefore, the respondent respectfully urges this Court to deny the petition.

Respectfully submitted.

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